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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1077

6 CASES, MORE OR LESS, EACH CONTAINING 24 JARS  
OF PEANUT BUTTER, LABELED IN PART (JARS): "TOP  
NOTCH BRAND," AND CONSOLIDATED CAUSES,

*Petitioners,*

*vs.*

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FOURTH CIRCUIT AND BRIEF IN SUP-  
PORT THEREOF.

RAYMOND M. HUBSON,  
J. CHARLES FAGAN,  
*Counsel for Petitioners.*



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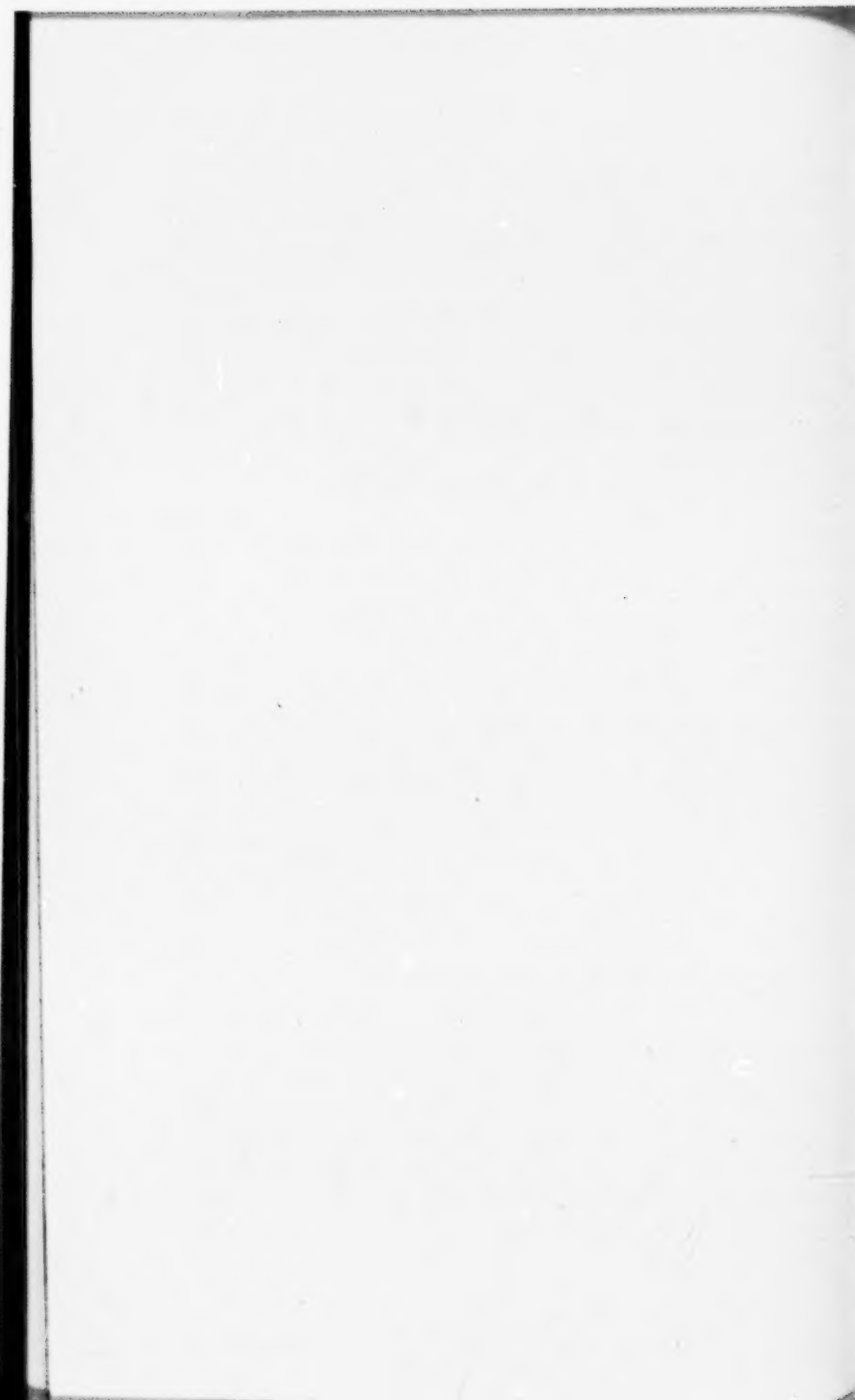
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75 CASES, MORE OR LESS, EACH CONTAINING 24 JARS  
OF PEANUT BUTTER, LABELED IN PART (JARS): "TOP  
NOTCH BRAND," AND CONSOLIDATED CAUSES,

*Petitioners,*

*vs.*

THE UNITED STATES OF AMERICA

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**PETITION FOR A WRIT OF CERTIORARI WITH  
BRIEF TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE FOURTH CIRCUIT.**

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The Petitioner, the Old Dominion Peanut Corporation, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit, entered December 27, 1944 (R. 37), which reversed the judgment of the District Court of the District of Maryland, which impounded the evidence and dismissed five consolidated libels under the Federal Food, Drug and Cosmetic Act of 1938.

### **Opinions Below**

The opinion of the Circuit Court of Appeals (R. 37) is reported in 146 F. (2d) 124 and the opinion of the District Court (R. 26) is reported in 54 F. Supp. 641.

### **Jurisdiction**

The judgment of the Circuit Court of Appeals was entered December 27, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

### **Questions Presented**

1. Whether Section 703 of the Food Act 21 U. S. C. A. 373, which first came into the Court in 1938, which authorizes government inspection under the Food Act of records of the interstate carriers and interstate receivers also authorizes such inspection of the records of manufacturers and shippers of interstate merchandise, although Congress rejected an amendment, which specifically authorized the inspection of the records of such manufacturers and shippers.
2. Whether Section 704 of the Food Act 21 U. S. C. A. 374, which authorizes factory inspection of the manufacturer also authorizes such inspection of the manufacturer's records.
3. Whether the 4th or 5th amendment to the constitution protect against unconstitutional searches and seizures in libels to condemn under the Food Act, 21 U. S. C. A. 14.
4. If Sections 703 and 704, 21 U. S. C. A. 373 and 374, either or both require or authorize an inspection of the manufacturer and shipper's records would either or both be constitutional.



5. Whether the Circuit Court of Appeals can reverse or vacate findings of fact of the District Court made in the opinion after hearing the affidavit and listening to oral conflicting testimony of witnesses whom the Court commended for frankness.

### **Statutes Involved**

The pertinent provisions of the Federal Food Act, 21 U. S. C. A. 1, 2, 14, 372 (c), 373, 374 and other sections mentioned in Appendix "B" pages 30 to 33.

### **Statement**

The Government filed five libels which were consolidated alleging that certain peanutbutter and chocolate coated peanuts belonging to the Old Dominion Peanut Corporation, Claimant, which were seized in Maryland and North Carolina were adulterated under 21 U. S. C. A. 342 (a)(3) and (4).

The Government Inspector without any knowledge or information as to the condition of any of this peanutbutter and candy, unlawfully and illegally and in violation of the Food Act and the 4th and 5th Amendments of the Constitution, obtained by mis-representation and carried away certain peanutbutter at the claimant's plant in Norfolk, Virginia, and likewise illegally and unlawfully and in violation of the act, and of the 4th and 5th Amendments of the Constitution, by misrepresentation obtained leave, not voluntary, to copy shipping records of the claimant thus discovering the names and addresses of various of its customers. Claimant did not knowingly consent to or permit the taking of the merchandise or copying of the records.

The District Court read the affidavit and heard the conflicting oral testimony of the witnesses and then made the following findings of fact in the opinion (R. 27).

*"In the present case, I find from the weight of credible evidence that there was no such full and complete disclosure as the Government was required to make. It is true the president of the company testified,—and I think his testimony is characterized by complete frankness, as also is that of the Government inspector,—that he gave permission to the inspector to look at the records, but there is no evidence of any conversation on any occasion, or any discussion between the inspector and the president of the company or any one else connected with the company, as to the precise use to which disclosure of the records would be put. Yet the information so obtained was made the basis of these proceedings, and is the only basis for them. That smacks of surprise, if not of actual misrepresentation, and I do not think that is a permissible way for the Government to proceed. It should follow the strict provisions of the law. It should not so combine a factory inspection with an examination of the records as might,—and as, I find in the present case, did, in fact—mislead the factory owner or operator as to just what use the Government might make of the shipping data gleaned from these records. Possible damage to claimant's business reputation was likely to be involved in stoppage and seizure of its shipments in interstate movement,—far more damage than would normally be contemplated by imposing added sanitary requirements for manufacture of the product so shipped."*

*"I rest my decision upon what I believe to be the proper interpretation of the Act as applied to the particular facts as I find them from the weight of the credible evidence."*

*"Yet, for aught that appears, there is reasonable ground to believe that the Government's position was misrepresented; and, in any event, where the Act says that investigators, before starting libel proceedings based upon interstate shipments shall obtain records in a certain way, they should either proceed accord-*

ingly, or should make complete disclosure to the factory owner or operator and be sure that his consent to examination of his records is not due in any respect to a failure to understand the full use to which the records might be put.

For the reasons given, I will sign an order granting the motion to impound and to return the evidence taken from the records of the claimant, *which means a dismissal of the present proceeding, because it is based on information which I rule was improperly obtained.*"

Through the information thus illegally obtained, the Government without any information that merchandise seized under the libels was adulterated, filed these libels and seized said merchandise and the Government contends that the merchandise seized under the libels is adulterated. The facts are set out in the Claimant's Motion and in the accompanying Affidavit of its President, Edgar S. Stubbs (R. 7) and no counter affidavits were filed.

The exceptions (R. 9) filed to the motion are not sworn to and do not deny the allegations of the affidavit—says only the Government is ready to disprove same.

But for said illegal seizures of samples and searches of the records and the copying of the latter, the Government would never have been able to make an analysis, or file these libels.

The Court after taking of testimony (R. 11) made findings of fact and conclusions of law entered an order (R. 29) impounding the evidence and dismissing the five consolidated libels and the United States appealed.

The Circuit Court of Appeals reversed the holdings and the findings of fact of the District Court and held that the inspection of petitioner's records was not prevented by the carrier's record section, being Section 703 of the Food Act; 21 U. S. C. A. 373, but was authorized by the factory inspection section, being Section 704; 21 U. S. C. A. 374.

The Circuit Court of Appeals further held that the 4th Amendment to the Constitution is not applicable to improper searches and seizures in label proceedings to condemn merchandise under the Food Act (R. 32).

The Secretary of Agriculture could easily and legally (21 U. S. C. A. 72 (c)) obtain an abundance of samples from other Government departments as in 1942 the petitioner sold to the United States Government 12,000 to 15,000 cases of peanutbutter on samples and there was no complaint or rejection. In 1943 it sold the United States Government 25,000 cases on sample and inspection and only one small order was rejected on the samples but it was not condemned nor termed by the Government as adulterated. In 1942 and 1943 it sold the State of Pennsylvania on samples 1,000 cases also 1,000 cases each year to New Jersey, whose pure food laws are very strict. It sold similar amounts each year to Connecticut and Virginia. It sold North Carolina 2,000 cases each year. There were no complaints or rejections by any of these States. Counsel has not at hand the 1944 sales to the Government.

### **Specification of Errors to Be Urged**

The Circuit Court of Appeals erred:

1. In construing Section 704 of the Food Act; 21 U. S. C. A. 374, the factory inspection section, to validly authorize government food inspector to search the records of manufacturers and shippers.

2. In holding that the 4th Amendment to the Constitution does not protect against illegal and unlawful searches and seizures in condemnation libels under the Food Act 21 U. S. C. A. 14.

3. In vacating the findings of fact of the District Court and in then holding that petitioner voluntarily consented to the search of its records.

4. In vacating the judgment of the District Court.

### **Reasons for Granting the Writ**

1. The Circuit Court of Appeals has legislated by reading words that are not there into the Factory Inspection Section 704 of the Food Act; 21 U. S. C. A. 374 after Congress had refused to insert words that would have the same effect in the Carriers' Inspection Section 703; 21 U. S. C. A. 373.

This point has never been passed upon by this Court and it is of sufficient public importance to justify this Court in settling it.

2. The Circuit Court of Appeals has decided an important constitutional question contrary to principles heretofore enunciated by this Court in construing a practically similar customs statute in a "civil action" to condemn merchandise in *Boyd v. U. S.*, 116 U. S. 616; 29 L. Ed. 746 which seems to be a case "on all fours" with the one at bar. The *Boyd* case was followed by *Lees v. U. S.*, 150 U. S. 460; 37 Law Ed. 1160.

When Congress enacted the Food Act in 1938 it did so in the light of the decision in the *Boyd* case and the *Lees* case and was thereby led to refuse to insert the words "shippers dealers" in Section 703; 21 U. S. C. A. 373.

3. The Circuit Court of Appeals vacated the findings of fact made by the District Court after hearing conflicting witnesses and reading an affidavit, and as such vacating of such findings is contrary to the civil procedure rules. Such a departure from the accepted and usual course of judicial

proceedings as to call for the exercise of this Court's power of supervision.

4. The petitioner did not voluntarily consent to the examination of its shipping records and it did nothing that would constitute a waiver of its privileges and rights under the 4th and 5th Amendments.

5. This Court will not permit the United States to accept or use the benefits and fruits obtained by the wrongful actions and misrepresentation of its agents.

6. The Circuit Court of Appeals' decision as to what constitutes a voluntary consent to inspect the petitioner's records or waiver of its rights and privileges under the 4th and 5th Amendments is in conflict with two decisions of the United States Court of Appeals of the District of Columbia on what constitutes a voluntary consent.

### **Conclusion**

The questions here involved are not merely of interest to the petitioner but rather of great general importance to all producers and shippers of foods and drugs.

For the foregoing reasons and other reasons set out in the annexed brief it is respectfully submitted that this writ of certiorari should be granted.

RAYMOND M. HUDSON,  
J. CHARLES FAGAN,  
*Attorneys for the Petitioner.*

